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this Memorandum Decision shall not be
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establishing the defense of res judicata,
collateral estoppel, or the law of the case.

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**IN THE
COURT OF APPEALS OF INDIANA**

JAMES BEDREE,)	
)	
Appellant-Plaintiff,)	
)	
vs.)	No. 02A05-0606-CV-310
)	
WELLS FARGO BANK,)	
)	
Appellee-Defendant.)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable James A. Heimann, Judge
Cause No. 02D01-0506-CT-261

March 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

James Bedree (“Bedree”) appeals the trial court’s dismissal of his complaint for damages against Wells Fargo Bank (the “Bank”). Bedree raises two issues on appeal that we restate as:

- I. Whether the trial court properly dismissed Bedree’s claim against the Bank.
- II. Whether the trial court properly denied Bedree’s petition for relief from judgment.

We affirm.

FACTS AND PROCEDURAL HISTORY

Bedree filed suit against the Bank alleging that the Bank’s failure to timely comply with a subpoena Bedree had issued in conjunction with a former lawsuit (the “Mitchell lawsuit”) caused him to lose that suit. The Bank moved to dismiss claiming that the Mitchell lawsuit addressed the issue of whether the Bank was at fault for Bedree’s loss, which collaterally estopped Bedree from bringing his subsequent claim against the Bank. The trial court agreed.

The facts relevant to this appeal are as follows: Bedree’s sister, Emily Bedree (“Emily”), died intestate on June 27, 1999. Thereafter, Mitchell Bedree (“Mitchell”), Emily’s nephew, was appointed Successor Personal Representative of Emily’s estate. During Mitchell’s administration of the estate, he discovered a promissory note dated June 1, 1998 and signed by Bedree, with a face value of \$250,000.00 with a 6% per annum interest rate to be paid within twelve months.

Mitchell brought suit against Bedree to recover the past due debt. Bedree responded with a pleading entitled, “Complaint for Collusion Extortion Predatoriness

Counter Claim Answer to Mitchell Bedree,” in which he claimed the signature on the promissory note was not his own.¹ *Appellee’s App.* at 58. On November 21, 2002, Mitchell had the trial court appoint a handwriting expert. Mitchell then served Bedree with a subpoena directing Bedree to produce six handwriting samples, five of which were to be cancelled checks from each of the preceding five years. For eight months, Bedree failed to produce the checks despite Mitchell’s repeated requests. On February 27, 2003, Mitchell moved for summary judgment claiming that Bedree’s repeated failure to comply with discovery resulted in the relinquishment of his affirmative defense and as such, should result in judgment as a matter of law in favor of Mitchell. *Id.* at 51. On June 17, 2003, Bedree subpoenaed the Bank to produce the requested checks within ten days. On July 23, 2003, the Bank sent Bedree the checks. It was already too late, however, because on July 15, 2003 the trial court had entered summary judgment in favor of Mitchell. Bedree moved the trial court to correct error, Mitchell responded, and the trial court denied the motion.

On June 20, 2005, Bedree filed suit against the Bank alleging that the Bank’s failure to deliver the requested checks in the Mitchell lawsuit before final judgment was entered and within the time frame specified in the subpoena resulted in the adverse judgment. The Bank answered and moved to dismiss, claiming Bedree’s suit was barred by the doctrine of collateral estoppel because he had been previously given a full and fair opportunity through his motion to correct error to establish the Bank’s fault and he had

¹ Bedree’s request for a special judge caused the Mitchell lawsuit to transfer from Allen County to LaGrange County. After the case was transferred, the cause number changed from 02D01-0203-PL-207 to 44C01-0208-PL-21.

available to him a plethora of discovery tools before final judgment to ensure the Bank's compliance. The trial court scheduled the matter for a hearing that Bedree failed to attend. The trial court granted the Bank's motion to dismiss. Thereafter, Bedree filed an Indiana Trial Rule 60 petition for relief from judgment, contending he did not receive timely notice of the hearing on the motion to dismiss and was surprised by the ruling. The Bank again responded and claimed Bedree did not establish excusable neglect and a meritorious basis for relief. The trial court denied the petition and Bedree now appeals.

DISCUSSION AND DECISION

I. Motion to Dismiss Based on Collateral Estoppel

This court's standard of review of a motion to dismiss pursuant to Indiana Trial Rule 12(B)(6) is *de novo*. *Richter v. Asbestos Insulating & Roofing*, 790 N.E.2d 1000, 1002 (Ind. Ct. App. 2003). A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint, not the facts supporting it. *Id.* Dismissal is appropriate when this court is legally certain that the plaintiff would not prevail under any set of facts. *Id.* The focus of a motion to dismiss resides with the complaint.

Issue preclusion or collateral estoppel bars the subsequent litigation of an issue previously litigated on the merits in a past lawsuit that reached final judgment. *Afolabi v. Atl. Mortgage & Inv. Corp.*, 849 N.E.2d 1170, 1175 (Ind. Ct. App. 2006). Collateral estoppel is applicable even if the previous litigation involved a different claim. *Id.* However, "collateral estoppel does not extend to matters that were not expressly adjudicated and can be inferred only by argument. *Id.* In order for collateral estoppel to be applicable, the trial court must find the party in the prior action had a full and fair

opportunity to litigate the issue, and it would not otherwise be unfair to apply collateral estoppel given the facts of the particular case. *Id.* at 1175-76.

Bedree claims that collateral estoppel is inapplicable because he was not given a full and fair opportunity in the previous action between himself and Mitchell to litigate whether the Bank's failure to produce the checks pursuant to the subpoena resulted in the adverse judgment.² We disagree.

In the Mitchell lawsuit, Bedree's motion to correct error attempted to blame the Bank for his failure to comply with discovery. The trial court considered his motion as well as Mitchell's response setting forth, ". . . Bedree's attempts to blame [the Bank] for his situations are without merit." *Appellee's App.* at 100-01. The trial court considered both the motion and the response and still denied the motion to correct error. Prior to Bedree's motion to correct error, Bedree's effort to affirmatively defend against Mitchell's action required his compliance with discovery. For over eight months, Bedree failed to produce the necessary handwriting exemplars to exculpate him from the Mitchell lawsuit. Although Bedree subpoenaed the Bank for the handwriting samples, he did so seven months after the initial request, and he failed to produce any of the other handwriting samples requested by the Bank. Further, Bedree had a full and fair

² Bedree cites two cases for support, namely *Luben Indus., Inc. v. U.S.*, 707 F.2d 1037 (9th Cir. 1983) and *Cal. State Auto. Assoc. Inter-Ins. Bureau v. Superior Court of San Francisco*, 50 Cal.3d 658 (Cal. 1990). However, neither of these cases apply here. In *Luben*, the Ninth Circuit reviewed whether a party could use an interlocutory order issued by another court ruling on the same issue to collaterally estop the government from relitigating the issue. *Luben*, 707 F.2d at 1039. The court held that it could not because the lower court's ruling was not "sufficiently firm" for collateral estoppel purposes. *Id.* at 1040. The court stated that the lower court was free to revise its previous ruling any time before final judgment. *Id.* In *CSAIIIB*, the California Supreme Court concluded that a settlement between parties on an insurance claim provided an insufficient basis for collateral estoppel. *CSSAIIIB*, 50 Cal.3d at 663. Instead, the court held that there must be a conclusive judicial determination of the insured's liability before another party may use it against the insurer. *Id.* at 662-63.

opportunity in the Mitchell lawsuit to utilize various discovery tools and determine whether the Bank should have been sanctioned for its conduct. Bedree failed to exploit these options. This failure supported the trial court's discretion to prohibit Bedree's claim that the signature on the promissory note was not his own. *See Everage v. N. Ind. Pub. Serv. Co.*, 825 N.E.2d 941, 951 (Ind. Ct. App. 2003) (trial court has discretion to exclude evidence as sanction for a failure to comply with discovery matters). The Mitchell lawsuit addressed and disposed of Bedree's claim that the Bank was to blame for his failure to comply with discovery. The trial court properly granted the Bank's motion to dismiss based on collateral estoppel.

II. Petition for Relief from Judgment

Pursuant to Indiana Trial Rule 60(B)(1), a trial court may relieve a party from an entry of default, final order, or final judgment for mistake, surprise, or excusable neglect. *Darling v. Martin*, 827 N.E.2d 1199, 1202 (Ind. Ct. App. 2005). "A trial court may also relieve a party if the judgment is void." *Id.* (citing T.R. 60(B)(6)). This court reviews a trial court's denial of a motion for relief from judgment for an abuse of discretion. *Id.* (citing *Case v. Case*, 794 N.E.2d 514, 517 (Ind. Ct. App. 2003)). A trial court abuses its discretion when its denial is clearly against the logic and effect of the facts and inferences supporting the judgment for relief. *Id.* "On a motion for relief from judgment, the burden is on the movant to demonstrate that relief is both necessary and just." *Id.* (quoting *G.B. v. State*, 715 N.E.2d 951, 953 (Ind. Ct. App. 1999)).

As required by Indiana Appellate Rule 46(A)(8)(a), we first note that Bedree's brief fails to presents any argument, contention, or cogent reasoning to explain why the

trial court committed reversible error in denying his motion for relief from judgment. Although his reply brief does argue the issue and presents reasoning why the trial court committed reversible error, Indiana Appellate Rule 46(C) does not allow new issues to be raised for the first time in a reply brief. Bedree, therefore, waives this matter on appeal.

Waiver notwithstanding, we find that the trial court did not commit reversible error in denying Bedree's motion for relief. In his reply brief, Bedree contends that the trial court failed to serve him with notice of the hearing scheduled on the Bank's motion to dismiss until two weeks after the scheduled hearing. He claims the trial court's Chronological Case Summary ("CCS") does not evidence that a hearing was ever held. However, the trial court's CCS specifically shows that notice was given for the hearing and that it was to be held in the Adams Superior Court and not the Allen Superior Court. Pursuant to Indiana Trial Rule 72(E), if notice is indicated in the CCS, even if the party never received it, a claim of lack of notice shall not authorize the court to relieve the party. *See In re Marriage of Minnick*, 663 N.E.2d 1226, 1228 (Ind. Ct. App. 1996) ("challenge to the mailing of notice is precluded when the docket clearly states that notice was mailed."). The trial court did not abuse its discretion in denying Bedree's motion for relief from judgment.

Affirmed.

RILEY, J., and FRIEDLANDER, J., concur.